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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 73-109

DEBRA MILLENSON, on behalf of herself and all others similarly situated,

Petitioner,

—v.—

THE NEW HOTEL MONTELEONE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner, Debra Millenson, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 23, 1973, rehearing denied, May 9, 1973.

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit has not yet been reported; it is set out in the Appendix, *infra,* at pp. 15-18. The District Court for the Eastern District of Louisiana did not issue a written opinion; the portion of the transcript embodying its conclusions is set out in the Appendix, *infra,* at pp. 21-23.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 23, 1973. A timely filed petition for rehearing was denied May 9, 1973. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

Question Presented

Whether a liquor license granted by the state to a place of public accommodation that invites patronage by all adult members of the male sex, but refuses to serve and excludes as customers all members of the female sex, constitutes "state action" proscribed by the Fourteenth Amendment to the United States Constitution.

Statement of the Case

Petitioner, Debra Millenson, is an attorney licensed to practice law in the State of Louisiana. On May 18, 1972, Ms. Millenson and several companions, men and women, sought service at the Men's Grill of the New Hotel Monteleone, New Orleans, Louisiana.* Although there were vacant tables and other parties without reservations were seated, Millenson and her party were denied service because of the presence of women in her party.

Motivation for the Grill's exclusion of women is explained to the public in a Hotel advertisement which reads:

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* This statement incorporates verbatim the facts as reported in the opinion of the Court of Appeals, *infra* pp. 15-18.

Lunch for the liberated male

> Women. Bless them. They're the most delightful creatures on earth. But there are times when a man prefers the company of other men. To discuss business for instance, politics, sports, or, of course . . . women.

Following her exclusion from the Grill, Ms. Millenson filed this action for declaratory and injunctive relief against the New Hotel Monteleone. Suing on her own behalf and on behalf of all others similarly situated, Ms. Millenson requested 1) a declaration that the "males only" admission policy of the Grill, a liquor-licensed place of public accommodation, implicated the state in unconstitutional action; and 2) an injunction restraining continued operation of the Grill as a liquor-licensed place of public accommodation so long as it limits its customers to members of the male sex. In her complaint, Ms. Millenson alleged that the Grill was licensed pursuant to Louisiana law, that the Hotel collected state sales tax on Grill transactions, and that the Hotel received a rebate on such taxes pursuant to the New Orleans City Code.

On August 23, 1972, in a ruling from the bench immediately following oral argument, the district court denied Ms. Millenson's motion for summary judgment and granted the Hotel's motion to dismiss. Ms. Millenson took a timely appeal from the judgment of the district court dismissing her action. On March 23, 1973, the Court of Appeals for the Fifth Circuit affirmed the district court judgment. In a three-page per curiam opinion, the Court of Appeals 1) identified as the dispositive issue whether the issuance of regulatory licenses to a public accommodation by the state

will suffice to color the admission policies of the former with the authority and involvement of the latter; and 2) concluded that *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), was applicable and decisively called for a negative response.

On April 16, 1973, Ms. Millenson timely applied for rehearing and rehearing en banc. On May 9, 1973, her requests for rehearing and rehearing en banc were denied.

REASONS FOR GRANTING THE WRIT

The dispositive question in this case is whether a liquor-licensed place of public accommodation may, consistent with the Equal Protection Clause of the Fourteenth Amendment, exclude females from its premises while inviting the patronage of all adult members of the male sex. Summary exclusion of women, never of men, from places of public accommodation has been an accepted practice in restaurant and bar establishments across the country. Lower federal courts are divided on the issue whether operating licenses granted to places of public accommodation implicate the state in the discriminatory practices of such establishments so as to render the discrimination inconsonant with the Fourteenth Amendment equal protection mandate.

While in the instant case the courts below discerned no relevant distinction between private clubs and places of public accommodation, other courts have concluded that state involvement in discrimination is apparent when the discriminatory practice is that of a licensed place of public accommodation. Absent this Court's settlement of the issue, federal court scrutiny of sex discrimination in places of public accommodation will be determined by the geo-

graphical location of the establishment in question; constitutional review mandated in some federal districts will be foreclosed in others.

I.

Current Decisions of Federal Courts Regarding State Action Implicated in Granting Liquor Licenses to Places of Public Accommodation Conflict in Rationale and Result.

In *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), this Court declared state action implicated where a privately-owned restaurant on premises leased from the state followed a practice of excluding blacks. Advising lower courts of the nature of the inquiry to be pursued, the Court cautioned:

> Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance. 365 U.S. at 722.

Elaborating further, in *United States* v. *Guest*, 383 U.S. 745, the Court observed:

> [T]he involvement of the State need [not] be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation. 383 U.S. at 755-56.

In *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), the Court held, in a narrowly circumscribed opinion, that the grant of a liquor license to a private social club did not establish an official nexus sufficient to convert private discrimination into state action. Mr. Justice Rehnquist, in his opinion for the Court, carefully distinguished the situation of the Moose Lodge from that of an establishment of the kind represented by the Men's Grill at the New Hotel Monteleone:

> Moose Lodge is a private club in the ordinary meaning of that term. 407 U.S. at 171.
>
> Far from apparently holding itself out as a place of public accommodation, Moose Lodge quite ostentatiously proclaims the fact that it is not open to the public at large. 407 U.S. at 175.
>
> There is no suggestion in this record that Pennsylvania law, either as written or as applied, discriminates against minority groups . . . in their right to purchase and be served liquor in places of public accommodation. 407 U.S. at 175-76.

The *Moose Lodge* decision is consistent with scholarly analysis that called for appropriate regard for "the valuable right of the person or truly private group to engage in all manner of discrimination . . . ." Williams, The Twilight of State Action, 41 Tex. L. Rev. 347, 381 (1963). The decision is entirely compatible with commentary that sharply distinguishes associational interests in authentically private arrangements from settings in which equal protection claims are paramount, and privacy claims attenuated. See, *e.g.*, Henkin, *Shelley* v. *Kraemer*: Notes for a Revised Opinion, 110 Pa. L. Rev. 473 (1962). As stated by

Professor Black in Foreword, "State Action," Equal Protection and California's Proposition 14, 81 Harv. L. Rev. 69 (1967):

> [I]t seems inconceivable that society could live with an asymmetry . . . which reversed Negroes' conviction as sit-inners, while allowing proprietors to throw them out . . . . 81 Harv. L. Rev. at 95.

While the *Moose Lodge* opinion does not purport to cover places of public accommodation, and indeed expressly excludes them from the scope of the decision, the opinion has left lower courts without specific guidance for cases that fall between *Burton* and *Moose Lodge*. As noted in the Harvard Law Review 1971 Term Supreme Court Review:

> While holding that the particular set of relationships between the state liquor authority and Moose Lodge did not amount to state action, the Court made little contribution to the definition of what level of connection with the state would convert otherwise private conduct into that governed by the fourteenth amendment. 86 Harv. L. Rev. 70, 73 (1972).

The absence of clear guidance has resulted in conflicting decisions on whether state action for Fourteenth Amendment purposes is implicated in licensing places of public accommodation. District courts in New York and Ohio, both before and after *Moose Lodge*, have held that it is. The Court of Appeals for the Fifth Circuit, in the instant case, has held that it is not.

Seidenberg v. *McSorleys' Old Ale House*, 317 F. Supp. 593 (S.D.N.Y. 1970), a pre-*Moose Lodge* decision in a case on all fours with petitioner's, held that a public bar that

refused to serve women acted under color of state law by virtue of its liquor license. Not only was there pervasive state regulation of taverns open to the public, but by continuing "annually to renew defendant's license . . . without making any effort . . . to remedy the discrimination or revoke the license which defendant must have in order to practice it," the state "acted" in the manner proscribed in *Burton*. For the critical factor in *Burton* was state *inaction:*

> By its inaction . . . the State has not only made itself a party to the refusal of the service, but has elected to place its power, property and prestige behind the admitted discrimination. 365 U.S. at 725.

Distinguishing between private clubs and places of public accommodation, the *McSorleys'* opinion observes:

> [D]efendant differs from a private men's club, which does not purport, and is not required, to serve the public.
>
> . . . We deal with property voluntarily serving the public, devoted to a business in which volume of patronage is essential to commercial success. When a state licenses such an enterprise, in an area peculiarly subject to state regulation, pursuant to a statute imposing pervasive controls upon the conduct of the business, under circumstances in which state licensing practices endow the license with a certain franchise value as well, the state's involvement in the operation of defendant's business, and hence by implication in the exclusionary practice under attack, rises to the level of significant state action within the meaning of *Burton* . . . . 317 F. Supp. at 604-605.

In *Bennett* v. *Dyer's Chop House*, 350 F. Supp. 153 (N.D. Ohio 1972), a post-*Moose Lodge* case almost identical to petitioner's,* the court allied itself completely with the *McSorleys'* analysis. The *Dyer's* court found no conflict between its decision and *Moose Lodge*:

> Dyer's is not a club as defined in *Irvis*. Rather it is a corporation for profit, incorporated under the laws of the State of Ohio and open to the public during all of its business hours. This Court finds that *Irvis* is limited to a holding based on its particular facts and the case before this Court is clearly distinguishable on its facts. 350 F. Supp. at 155.

The Court of Appeals for the Fifth Circuit, by contrast, ignored the *Burton* admonition that facts must be sifted and circumstances weighed, disregarded the opinions in *McSorleys'* and *Dyer's*, and leaped without explanation from *Moose Lodge* to the determination that

> A cursory examination of the state licensing statutes manifestly leads one to the conclusion that they are completely unrelated to the admission policies of the licensees.

Apparently, examination of precedent was also cursory, for no state statute related to the admission policy at issue in *Burton*. Significantly, in a decision rendered a few weeks earlier, where the issue was race rather than sex discrimination, the Fifth Circuit noted its awareness that the *Moose Lodge* decision did not purport to reach places of

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* In *Dyer's*, however, the exclusion was not total as it is in the case at bar; women were allowed in except during the period 11:00 a.m. to 1:30 p.m., peak hours for the business lunch trade.

public accommodation. *Gilmore* v. *City of Montgomery,* 473 F.2d 832, 839 (5th Cir. 1973). A comparison of the brief per curiam opinion in the instant case with the opinion in *Gilmore* suggests that the court regarded race discrimination as an issue worthy of serious attention, but did not assign the same importance to blatant sex discrimination. The quick disposition of Ms. Millenson's claim is appropriately characterized as "offhand." The cavalier treatment accorded this case thus far supplies a further illustration for the catalogue of judicial exposition that led two "middle-aged, white male" commentators to conclude that

> the performance of American judges in the area of sex discrimination can be succinctly described as ranging from poor to abominable. Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U. L. Rev. 675, 676 (1971).

Performance of this kind, it is now plain, is no longer tolerable. See *Frontiero* v. *Richardson,* 41 U.S. Law Week 4609 (1973); *Reed* v. *Reed,* 404 U.S. 71 (1971).

In sum, the guidance of this Court is needed to resolve the glaring conflict between the Fifth Circuit and the District Courts for the Southern District of New York and the Northern District of Ohio, to assure the even-handed administration of federal law without regard to geographical accident, and to enunciate the standards governing state action outside discrete areas of purely private conduct in which associational interests are paramount.

II.

Federal Court Decisions on State Action of Fourteenth Amendment Dimension Both Before and After *Moose Lodge* Conflict in Rationale With the Decision Below in Petitioner's Case.

The conclusion of the Court of Appeals for the Fifth Circuit that the requisite state action was absent because "impetus for the grill's admission policies originated with the hotel and not with the state" misses the essential point of *Burton* and of subsequent cases that have relied upon *Burton* to find state action although the discriminatory policy emanated from a private defendant. See, e.g., *Pitts* v. *Department of Revenue,* 333 F. Supp. 662 (E.D. Wisc. 1971); *McGlotten* v. *Connally,* 338 F. Supp. 448 (D.D.C. 1972); *Falkenstein* v. *Department of Revenue,* 350 F. Supp. 887 (D. Ore. 1972) (tax exemption operated to encourage maintenance of discriminatory policy); *Male* v. *Crossroads Associates,* 469 F.2d 616 (2d Cir. 1972) (privately owned apartment complex with discriminatory rental policy involved state action based on administrative and financial connections with state and federal government); *Lavoie* v. *Bigwood,* 457 F.2d 7 (1st Cir. 1972) (discrimination by privately-owned trailer park entailed state action via exclusive zoning); *McQueen* v. *Drucker,* 438 F.2d 781 (1st Cir. 1971) (private housing on land condemned by and purchased from city); cf. *NLRB* v. *Mansion House Center Mfg. Corp.,* 41 U.S. Law Week 2448 (8th Cir. 1973) (Fifth Amendment prohibits requiring employer to bargain with union that maintains racially discriminatory membership policy).

The Fifth Circuit's per curiam opinion is clearly anomalous when placed in the context of contemporaneous state action decisions. It is at least open to question whether the court would have reached a similar conclusion in such short order had the Men's Grill chosen to discriminate on a basis other than sex. Significantly, the decision purports to be "neutral," thus countenancing the exclusion of any group deemed undesirable by the proprietor of a state licensed place of public accommodation. Absent definitive pronouncement by this Court on the scope of the state action concept in the area between *Burton* and *Moose Lodge,* further conflict among lower courts appears inevitable. Petitioner's case provides an ideal vehicle for clarification by this Court essential not only to resolve the present conflict, but to assure consistent identification and application of the constitutional "state action" standard in the future.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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